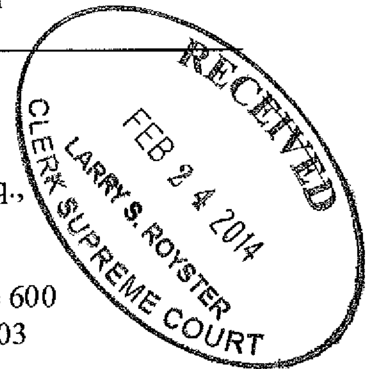
In the Supreme Court
Appeals from the Court of Appeals of Michigan

Plaintiff-Appellee, People of the State of Michigan v. Defendant-Appellant, Raymond Curtis Carp	Docket No. 146478
Plaintiff-Appellee, People of the State of Michigan v. Defendant-Appellant, Cortez Roland Davis	Docket No. 146819
Plaintiff-Appellee, People of the State of Michigan v. Defendant-Appellant, Dakotah Wolfgang Eliason	Docket No. 147428

Brief of Juvenile Law Center, et al.
as *AMICI CURIAE*
In Support of Appellants Carp, Davis and Eliason



Marsha L. Levick, Esq. PA
Attorney I.D. 22535
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
P: (215) 625-0551
F: (215) 625-2801
mlevick@jlc.org

Counsel for *Amici Curiae*

Bruce W. Neckers, Esq.,
P18198
Rhoades McKee PC
160 Ottawa NW, Suite 600
Grand Rapids, MI 49503
P: (616) 233-5217
F: (616) 233-5269
bwneckers@rhoadesmckee.com

Local Counsel

Dated: February 21, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTEREST AND IDENTITY OF *AMICI* 1

II. SUMMARY OF ARGUMENT 2

III. ARGUMENT 4

A. *Miller* Reaffirms The U.S. Supreme Court's Recognition That Children Are Categorically Less Deserving Of The Harshest Forms Of Punishments 4

B. *Miller v. Alabama* Applies Retroactively 6

1. *Miller* Is Retroactive Because Kuntrell Jackson Received The Same Relief On Collateral Review 7

2. *Miller* Applies Retroactively Pursuant To *Teague v. Lane* 7

a. Miller Is Retroactive Because It Announced A Substantive Rule That Categorically Prohibits The Imposition Of Mandatory Life Without Parole On All Juvenile Offenders 8

b. Miller Is Retroactive Because It Involves A Substantive Interpretation Of The Eighth Amendment That Reflects The Supreme Court's Evolving Understanding Of Child And Adolescent Development 12

c. Miller Is A "Watershed Rule" Under Teague 14

3. Once A Court Declares A Particular Sentence "Cruel And Unusual" When Imposed On A Juvenile, The Continued Imposition Of That Sentence Violates The Eighth Amendment 16

C. Any Life Without Parole Sentence For A Juvenile Who Did Not Kill or Intend To Kill Is Inconsistent With Adolescent Development And Neuroscience Research And Unconstitutional Pursuant To *Miller* And *Graham* 20

1. Intent To Kill Cannot Be Inferred When A Juvenile Is Convicted Of Felony Murder 21

2. Any Life Without Parole Sentence For A Juvenile Convicted Of Felony Murder Is Unconstitutional Pursuant To *Miller* And *Graham* 23

D. All Juveniles Convicted Of Murder In Michigan Are Entitled To Individualized Sentences That Presumptively Provide A Meaningful Opportunity For Release 25

1. Appropriate Occasions For Imposing Life Without Parole Sentences On Will Be Rare And Sentencers Must Consider How An Offender's Young Age Counsels In Favor Of Providing Release 25

2. Absent A Finding That Appellants Are Among The Rare Juveniles For Whom Life Without Parole Is Appropriate, They Must Be Provided A Meaningful Opportunity For Release 27

IV. CONCLUSION 31

APPENDIX A-1

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. Buss,
558 F.3d 657 (7th Cir. 2009) 8

Alleyne v. United States,
570 U.S. ---, 133 S. Ct. 2151 (2013)..9, 10

Baez Arroyo v. Dretke,
362 F. Supp. 2d 859 (W.D. Tex. 2005)..8

Black v. Bell,
664 F.3d 81 (6th Cir. 2011) 8

Bonilla v. State,
791 N.W.2d 697 (Iowa 2010) 9

Davis v. Norris,
423 F.3d 868 (8th Cir. 2005) 8

Duncan v. State,
925 So. 2d 245 (Ala. Crim. App. 2005)..9

Enmund v. Florida,
458 U.S. 782 (1982)...22

In re Evans,
449 Fed. App'x 284 (4th Cir. 2011) 9

Furman v. Georgia,
408 U.S. 238 (1972)...16, 18, 19

Graham v. Florida,
560 U.S. 48 (2012)..*passim*

Harmelin v. Michigan,
501 U.S. 957 (1991)...10

Hill v. Snyder,
No. 10-14568, 2013 WL 364198 (E.D. Mich., Jan. 30, 2013) 19

In re Holladay,
331 F.3d 1169 (11th Cir. 2003) 8

Holly v. Mississippi,
3:98CV53-D-A, 2006 WL 763133 (N.D. Miss. Mar. 24, 2006) 8

Horn v. Banks,
536 U.S. 266 (2002)....................9

Horn v. Quarterman,
508 F.3d 306 (5th Cir. 2007) 8

J.D.B. v. North Carolina,
131 S. Ct. 2394 (2011).................... *passim*

Kleppinger v.State,
81 So. 3d 547 (Fla. Dist. Ct. App. 2012) 9

LeCroy v. Sec'y, Florida Dept. of Corr.,
F.3d 1237, 1239 (11th Cir. 2005) 8

Lee v. Smeal,
447 F. App'x 357 (3d Cir. 2011) (unpublished) 8

Little v. Dretke,
407 F. Supp. 2d 819 (W.D. Tex. 2005)....................8

Loggins v. Thomas,
654 F.3d 1204 (11th Cir. 2011) 8

Mackey v. United States,
401 U.S. 667 (1971)....................17

Manuel v. State,
48 So. 3d 94 (Fla. Dist. Ct. App. 2010) 9

May v. Anderson,
345 U.S. 528 (1953)....................19, 30

Miller v. Alabama,
132 S. Ct. 2455 (2012).................... *passim*

Morris v. Dretke,
413 F.3d 484 (5th Cir. 2005) 8

Penry v. Lynaugh,
492 U.S. 302 (2002)....................10

People v. Aaron,
299 N.W.2d 304 (Mich. 1980) 21

People v. Carp,

828 N.W.2d 685 (2012) 28

People v. Davis,
No. 115595 (Ill., argued Jan. 15, 2014). 16

People v. Eliason,
300 Mich. App. 293, 833 N.W.2d 357 (2013) 29

People v. Williams,
982 N.E.2d 181, (Ill. App. Ct. 2012) 15

Ring v. Arizona,
536 U.S. 584 (2002) 11

Rogers v. State,
267 P.3d 802 (Nev. 2011) 9

Roper v. Simmons,
543 U.S. 551 (2005) .... *passim*

Saffle v. Parks,
494 U.S. 484, 110 S. Ct. 1257, 108 L. Ed. 2d 415 (1990) 8

Schriro v. Summerlin,
542 U.S. 348 (2004) 7, 8, 11

Sharikas v. Kelly,
1:07CV537CMHTCB, 2008 WL 6626950 (E.D. Va. Apr. 7, 2008) 8

Sims v. Commonwealth,
233 S.W.3d 731 (Ky. Ct. App. 2007) 9

In re Sparks,
657 F.3d 258 (5th Cir. 2011) 9

State v. Dyer,
77 So. 3d 928 (La. 2012) 9

State v. Mantich,
--- N.W.2d ---, 287 Neb. 320 (Feb. 7, 2014) 11. 14

Teague v. Lane,
489 U.S. 288 (1989) 7, 14, 15

Tison v. Arizona,
481 U.S. 137 (1987) 22

Trop v. Dulles,
356 U.S. 86 (1958) 16, 19

Whorton v. Bockting,
549 U.S. 406 (2007) 15

Witherspoon v. Illinois,
391 U.S. 510 (1968) 15

Woodson v. N. Carolina,
428 U.S. 280 (1976) 13

Statutes

M.C.L. 750.316 .... *passim*

M.C.L. 791.233 29

Ga. Comp. R. & Regs. r. 475-3-.05 29

Other Authorities

S. David Mitchell, *Blanket Retroactive Amelioration: a Remedy for Disproportionate Punishments*, 40 Fordham Urb.L.J. City Square 14 (2013), available at http://urbanlawjournal.com/?p=1224 18

Research on Pathways to Desistance; December 2012 Update, Models for Change, available at: http://www.modelsforchange.net/publications/357 28

I. INTEREST AND IDENTITY OF *AMICI*

The organizations and individuals submitting this brief work on behalf of adolescents in a variety of settings, including adolescents involved in the juvenile and criminal justice systems. *Amici* are advocates and researchers who have a wealth of experience and expertise in providing for the care, treatment, and rehabilitation of youth in the child welfare and justice systems. *Amici* know that youth who enter these systems need extra protection and special care. *Amici* understand from their collective experience that adolescent immaturity manifests itself in ways that implicate culpability, including diminished ability to assess risks, make good decisions, and control impulses. *Amici* also know that a core characteristic of adolescence is the capacity to change and mature. For these reasons, *Amici* believe that youth status separates juvenile and adult offenders in categorical and distinct ways that warrant distinct treatment under the Eighth Amendment. *See* Appendix for a list and brief description of all *Amici.*

II. SUMMARY OF ARGUMENT

In *Miller v. Alabama,* 567 U.S. ___, 132 S. Ct. 2455 (2012), the United States Supreme Court held that the mandatory imposition of sentences of life without the possibility of parole on juvenile offenders convicted of murder is unconstitutional. At the time Appellants were sentenced for crimes they committed as juveniles, state law mandated a life without parole sentence for their murder-based offenses. As applied to juvenile offenders, this mandatory scheme is unconstitutional pursuant to *Miller*, which reaffirms the U.S. Supreme Court's recognition that children are categorically less deserving of the harshest forms of punishments.

Miller applies retroactively to Appellants Carp and Davis and to other cases that have become final after the expiration of the period for direct review. Although *Miller* also applies retroactively under Michigan state law, *Amici* focus on *Miller*'s retroactivity under federal law and argue that *Miller* applies retroactively for four primary reasons. First, the United States Supreme Court has already applied *Miller* retroactively by affording relief in Kuntrell Jackson's case, which was before the Court on collateral review. Second, *Miller* announced a substantive rule, which pursuant to Supreme Court precedent applies retroactively. Third, even assuming the rule is procedural, *Miller* is a watershed rule of criminal procedure that applies retroactively. Finally, Miller must be applied retroactively because, once the Court determines that a punishment is cruel and unusual when imposed on a child, any continuing imposition of that sentence is itself a violation of the Eighth Amendment; the date upon which an unconstitutional mandatory life without parole sentence is imposed cannot convert it into a constitutional sentence.

Additionally, the prohibition against "cruel and unusual punishments" found in the Eighth Amendment to the United States Constitution categorically bars the imposition of a life

without parole sentence on juvenile offenders convicted solely on the basis of having aided and abetted the commission of a felony murder. Further, any life without parole sentence for a juvenile convicted of felony murder is inconsistent with adolescent development and neuroscience research and is unconstitutional pursuant to *Miller* and *Graham v. Florida*, 560 U.S. 48 (2010) (holding that a life without parole sentence can never be imposed upon a juvenile when there is no finding that the juvenile either killed or intended to kill). Every child convicted of murder in Michigan must receive an individualized sentence that takes into account his age and individual circumstances and, absent a finding that he is among the rare juveniles for whom life without parole is appropriate, he must be afforded a meaningful opportunity for release based on his demonstrated maturity and rehabilitation. *See Graham*, 560 U.S. 48.

III. ARGUMENT

A. *Miller* Reaffirms The U.S. Supreme Court's Recognition That Children Are Categorically Less Deserving Of The Harshest Forms Of Punishments

In *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2012), and *Miller v. Alabama,* 132 S. Ct. 2455 (2012), the U.S. Supreme Court recognized that children are fundamentally different from adults and categorically less deserving of the harshest forms of punishments.[1]

Relying on *Roper*, the U.S. Supreme Court in *Graham* cited three essential characteristics which distinguish youth from adults for culpability purposes:

> As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed."

560 U.S. at 68 (citing *Roper*, 543 U.S. at 569-70). *Graham* found that "[t]hese salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.'" *Id.* (*quoting* Roper, 543 U.S. at 569, 573). The Court concluded that "[a] juvenile is not absolved of responsibility for his actions, but his transgression 'is not as morally reprehensible as that of an adult.'" *Graham,* 560 U.S. at 68 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

[1] *Roper* held that imposing the death penalty on juvenile offenders violates the Eighth Amendment, 543 U.S. at 578; *Graham* held that life without parole sentences for juveniles convicted of non-homicide offenses violate the Eighth Amendment, 560 U.S. at 82; and *Miller* held that mandatory life without parole sentences imposed on juveniles convicted of homicide offenses violate the Eighth Amendment, 132 S. Ct. at 2469.

The *Graham* Court found that because the personalities of adolescents are still developing and capable of change, an irrevocable penalty that afforded no opportunity for release was developmentally inappropriate and constitutionally disproportionate. The Court further explained that:

> Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. *Roper*, 543 U.S. at 570. It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

Id. The Court's holding rested largely on the incongruity of imposing a final and irrevocable penalty on an adolescent, who had capacity to change and grow.

In reaching these conclusions about a juvenile's reduced culpability, the U.S. Supreme Court has relied upon an increasingly settled body of research confirming the distinct emotional, psychological and neurological attributes of youth. The Court clarified in *Graham* that, since *Roper*, "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." *Graham*, 560 U.S. at 68. Thus, the Court underscored that because juveniles are more likely to be reformed than adults, the "status of the offender" is central to the question of whether a punishment is constitutional. *Id.* at 68-69.

The U.S. Supreme Court in *Miller* expanded its juvenile sentencing jurisprudence, banning mandatory life without parole sentences for children convicted of homicide offenses. Reiterating that children are fundamentally different from adults, the Court held that, prior to imposing such a sentence on a juvenile offender, the sentencer must take into account the

juvenile's reduced blameworthiness. *Miller*, 132 S. Ct. at 2460. Justice Kagan, writing for the majority in *Miller*, was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id.* (quoting *Graham*, 560 U.S. at 68, 74). The Court grounded its holding "not only on common sense . . . but on science and social science as well," *id.* at 2464, which demonstrate fundamental differences between juveniles and adults. The Court noted "that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id.* at 2464-65 (quoting *Graham*, 560 U.S. at 68-69; *Roper*, 543 U.S. at 570).

Importantly, in *Miller*, the Court found that none of what *Graham* "said about children – about their distinctive (and transitory) mental traits and environmental vulnerabilities – is crime-specific." 132 S. Ct. at 2465. The Court instead emphasized "that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id.* As a result, it held in *Miller* "that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders," *id.* at 2469, because "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it." *Id.* at 2467.

B. *Miller v. Alabama* Applies Retroactively

United States Supreme Court precedent requires that *Miller* be applied retroactively to

Appellants Carp and Davis.

1. *Miller* Is Retroactive Because Kuntrell Jackson Received The Same Relief On Collateral Review

In affording relief to Kuntrell Jackson on collateral review – whose case, *Jackson v. Hobbs*, was the companion case to *Miller* – the United States Supreme Court has already noted its intention that *Miller* apply retroactively. Had *Miller* not applied retroactively to cases on collateral review, Jackson would have been precluded from the relief he was granted.[2] Additionally, "once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated." *Teague v. Lane*, 489 U.S. 288, 300 (1989) (plurality). Therefore, if a new rule is announced and applied to a defendant on collateral review, as occurred in *Miller*, that rule necessarily is retroactive. Given the Court's application of *Miller* retroactively to Jackson's case on collateral review, further analysis is not necessary.

2. *Miller* Applies Retroactively Pursuant To *Teague v. Lane*

In *Teague v. Lane*, the U.S. Supreme Court held a new Supreme Court rule applies retroactively to cases on collateral review only if: (a) it is a substantive rule or (b) if it is a watershed rule of criminal procedure. 489 U.S. at 307, 311. *See also Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004). Because *Miller* announced a new substantive rule or, in the alternative, a "watershed" procedural rule, *Miller* applies retroactively.

---

[2] Notably, *Jackson* and *Miller* were joined and both Miller and Jackson received the same relief, in the same manner. This is clear from the Court's assertion that both cases were remanded "for further proceedings not inconsistent with" its opinion. *Miller*, 132 S. Ct. at 2475.

a. *Miller* Is Retroactive Because It Announced A Substantive Rule That Categorically Prohibits The Imposition Of Mandatory Life Without Parole On All Juvenile Offenders

The U.S. Supreme Court has held that "[n]ew *substantive* rules generally apply retroactively." *Summerlin*, 542 U.S. at 351. A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law punishes." *Id.* New substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant' . . . faces a punishment that the law cannot impose upon him." *Id.* at 352 (quoting *Bousley v. United States*, 523 U.S. 614, 620 (1998)). A new rule is substantive if it "'prohibit[s] a certain category of punishment for a class of defendants because of their status or offense.'" *Saffle v. Parks*, 494 U.S. 484, 494-95, 110 S. Ct. 1257, 1263, 108 L. Ed. 2d 415 (1990) (quoting *Penry v. Lynaugh,* 492 U.S. 302, 329, 330 (2002), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002)).

The new rule announced in *Miller* is substantive and therefore retroactive, because Appellants are now serving a punishment – mandatory life without parole – that, pursuant to *Miller*, the law can no longer impose on them. *See Summerlin*, 542 U.S. at 352. Like the rules announced in *Atkins*, *Roper* and *Graham*, which have all been applied retroactively,[3] *Miller*

[3] Courts across the country have applied *Atkins* retroactively. *See, e.g.*, *Morris v. Dretke*, 413 F.3d 484, 487 (5th Cir. 2005); *Black v. Bell*, 664 F.3d 81, 92 (6th Cir. 2011) *Allen v. Buss*, 558 F.3d 657, 661 (7th Cir. 2009); *Davis v. Norris*, 423 F.3d 868, 879 (8th Cir. 2005); *In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003). Similarly, *Roper* and *Graham*, two cases upon which *Miller* relies, have been applied retroactively. *See Loggins v. Thomas*, 654 F.3d 1204, 1206 (11th Cir. 2011) (noting *Roper* applied retroactively to case on collateral review); *Lee v. Smeal*, 447 F. App'x 357, 359 n.2 (3d Cir. 2011) (unpublished) (same); *Horn v. Quarterman*, 508 F.3d 306, 308 (5th Cir. 2007) (same); *LeCroy v. Sec'y, Florida Dept. of Corr.*, F.3d 1237, 1239 (11th Cir. 2005) (same); *Sharikas v. Kelly*, 1:07CV537CMHTCB, 2008 WL 6626950 (E.D. Va. Apr. 7, 2008) (unpublished) (same); *Holly v. Mississippi*, 3:98CV53-D-A, 2006 WL 763133 (N.D. Miss. Mar. 24, 2006) (unpublished) (applying *Roper* retroactively to case on collateral review); *Little v. Dretke*, 407 F. Supp. 2d 819, 824 (W.D. Tex. 2005) (same); *Baez Arroyo v. Dretke*, 362 F. Supp. 2d 859, 883 (W.D. Tex. 2005) (same), *aff'd sub nom Arroyo v.*

"prohibit[s] a certain category of punishment" – mandatory life imprisonment without the possibility of parole – "for a class of defendants," – juvenile homicide offenders. *Horn v. Banks*, 536 U.S. 266, 272 (2002).

Supreme Court precedent and logic establish that mandatory life without parole sentences (which carry a mandatory minimum of a lifetime in prison as well as certain death in prison) are substantively distinct and harsher than alternative sentencing schemes in which life without parole is, at most, a discretionary alternative. Most recently, in *Alleyne v. United States*, 570 U.S. ---, 133 S. Ct. 2151 (2013), the Court stated that "[m]andatory minimum sentences increase the penalty for the crime." 133 S. Ct. at 2155. The Court found that an increase in a mandatory minimum sentence "aggravates the punishment." *Id.* at 2158. The Court described a sentence with a higher mandatory minimum as "a new penalty," *id.* at 2160, finding it "impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id.* The Court explained that "[e]levating the low-end of a sentencing range heightens the loss of liberty associated with the crime." *Id.* at 2161.

Alleyne makes clear that a sentence with a mandatory minimum of life is substantively different from a *discretionary* life without parole sentence. A mandatory life without parole

---

Quarterman, 222 F. App'x 425 (5th Cir. 2007) (unpublished); *Sims v. Commonwealth*, 233 S.W.3d 731, 733 (Ky. Ct. App. 2007) ("*Roper* must be given retroactive application in all those cases in which a sentence of death was imposed upon a defendant who was under the age of 18 at the time he committed the crime."); *Duncan v. State,* 925 So. 2d 245, 252 (Ala. Crim. App. 2005) (applying *Roper* retroactively). *See also In re Sparks*, 657 F.3d 258, 262 (5th Cir. 2011) (holding *Graham* was made retroactive on collateral review); *Bonilla v. State*, 791 N.W.2d 697, 700-01 (Iowa 2010) (holding *Graham* applies retroactively); *In re Evans*, 449 Fed. App'x 284 (4th Cir. 2011) (per curiam) (unpublished) (noting Government "properly acknowledged" *Graham* applies retroactively on collateral review); *Kleppinger v. State*, 81 So. 3d 547, 550 (Fla. Dist. Ct. App. 2012) (applying *Graham* on collateral review); *Manuel v. State*, 48 So. 3d 94, 97 (Fla. Dist. Ct. App. 2010) (same); *State v. Dyer*, 77 So. 3d 928, 929 (La. 2012) (same); *Rogers v. State*, 267 P.3d 802, 804 (Nev. 2011) (noting that district court properly applied *Graham* retroactively).

sentence is substantively harsher, more aggravated, and implicates a greater loss of liberty than a discretionary sentencing scheme. *Miller* is the flip-side of *Alleyne*; just as the newly imposed mandatory minimum sentence in *Alleyne* created a "new penalty," so too does *Miller's* requirement that states adopt alternative sentencing options in addition to, and short of, life without parole establish a new penalty.

Prior to *Miller*, a juvenile convicted under M.C.L. 750.316 faced only one sentencing option – life without parole. *See* M.C.L. 750.316. As clarified by *Alleyne*, *Miller* did not simply require that certain factors uniquely relevant to youth be considered before a juvenile can receive life without parole, it in fact *expanded* the range of sentencing options available to juveniles by prohibiting mandatory life without parole and requiring that *additional* sentencing options be put in place – a fundamental change in sentencing for juveniles that goes well beyond a change in process. Because the U.S. Supreme Court has found this mandatory life without parole sentencing scheme unconstitutionally disproportionate as applied to juveniles, Appellants are entitled to be resentenced pursuant to a sentencing scheme that comports with *Miller*'s constitutional mandates – one that is proportionate and individualized.[4]

Additionally, the fact that *Miller* did impose new factors that a sentencer must consider

---

[4] *Miller* noted, as previously held in *Harmelin v. Michigan*, 501 U.S. 957 (1991), that in the adult context, there is no substantive right against mandatory sentencing – "a sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is mandatory." *Miller*, 132 S. Ct. at 2470. In the juvenile context, *Miller* held the opposite, explicitly finding a mandatory life without parole sentence cruel and unusual, while leaving open the possibility that *discretionary* life without parole sentences might still be imposed. The Court wrote, "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentence of juvenile offenders." *Id.* Instead, the Court likened its holding to *Roper* and *Graham*, decisions finding that "a sentencing rule permissible for adults may not be so for children." *Id.* By rejecting *Harmelin,* the Court implicitly held that mandatory life without parole is *categorically* cruel and unusual for juveniles – and thus "prohibit[ed] a certain category of punishment for a class of defendants because of their status or offense." *Penry, v. Lynaugh*, 492 U.S. 302, 330 (1989).

before imposing juvenile life without parole likewise necessitates a finding that *Miller* announced a substantive rule; in this way, it differs significantly from the Sixth Amendment cases that found procedures that result in punishment not to apply retroactively. The Court's refusal to hold *Ring v. Arizona*, 536 U.S. 584 (2002), retroactive in *Schriro v. Summerlin*, 542 U.S. 348, 354 (2004), illustrates this point. In *Ring,* the Court had held that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating factors essential to imposition of the death penalty upon adults. In *Summerlin*, the Court distinguished between *procedural* rules that require the Court to determine who must make certain findings before a particular sentence could be imposed and *substantive* rules that rely on the Court itself to establish that certain factors are required before a particular sentence could be imposed:

> This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive.

542 U.S. 348 at 354 (emphasis in original). Because *Miller* requires the sentencer "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison," *Miller*, 132 S. Ct. at 2469, the Court has made consideration of certain factors a prerequisite to imposing life without parole on juveniles, which, as directed by *Summerlin*, renders *Miller* a substantive rule. *See, e.g., State v. Mantich*, ---- N.W.2d ---, 287 Neb. 320, 340 (Feb. 7, 2014) (concluding that because "*Miller* required a sentencer of a juvenile to consider new facts, i.e., mitigation evidence, before imposing a life imprisonment sentence with no possibility of parole…this approaches what the Court itself held in *Schriro* would amount to a new substantive rule: The Court made a certain fact (consideration of mitigating evidence) essential to imposition of a sentence of life imprisonment without parole.

In other words, it imposed a new requirement as to what a sentencer must consider in order to constitutionally impose life imprisonment without parole on a juvenile.") Because *Miller* relies on a new, substantive interpretation of the Eighth Amendment that recognizes that children are categorically less culpable than adults, and because sentencers must consider how these differences mitigate against imposing life without parole on youth, the decision must be applied retroactively.

b. *Miller* Is Retroactive Because It Involves A Substantive Interpretation Of The Eighth Amendment That Reflects The Supreme Court's Evolving Understanding Of Child And Adolescent Development

The Supreme Court consistently has recognized that a child's age is far "more than a chronological fact," and has recently acknowledged that it bears directly on children's constitutional rights and status in the justice system. *See, e.g.*, *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citations omitted). *Roper*, *Graham*, and *Miller* have enriched the Court's Eighth Amendment jurisprudence with scientific research confirming that youth merit distinctive treatment. *See Roper*, 543 U.S. at 569-70 (explaining that "[t]hree general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders") (citing Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Rev. 339 (1992); Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003)); *Graham*, 560 U.S. at 68 (reiterating that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"); *Miller*, 132 S. Ct. at 2465 ("[t]he evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").

This new understanding of the Eighth Amendment that juveniles, as a class, are less culpable than adult offenders underlies the holding in *Miller,* 132 S. Ct. at 2469, and reflects a substantive change in Eighth Amendment jurisprudence. To ensure that the sentencing of juveniles is constitutionally appropriate, *Miller* requires that, prior to imposing a life without parole sentence on a juvenile offender, the sentencer must consider the factors that relate to the youth's overall culpability and capacity for rehabilitation. These factors include: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." 132 S. Ct. at 2468-69. *Miller* therefore requires a substantive, individualized assessment of the juvenile's culpability prior to imposing life without parole.

In requiring individualized sentencing in adult capital cases, the Supreme Court stated that "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a *constitutionally indispensable* part of the process of inflicting the penalty of death." *Woodson v. North Carolina,* 428 U.S. 280, 304, (1976) (internal citation omitted) (emphasis added). Since *Miller* acknowledges that life without parole sentences for juveniles are "akin to the death penalty" for adults, 132 S. Ct. at 2566, *Miller*'s requirement of individualized consideration of a youth's lessened culpability and potential for rehabilitation is similarly "constitutionally indispensable" and reflects a new substantive requirement in juvenile

sentencing.

The language of *Miller* demonstrates that the rule announced was not considered a mere procedural checklist, but a substantive shift in juvenile sentencing. The Court found:

> But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.* . . . Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, *we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.*

Miller, 132 S. Ct. at 2469 (emphasis added). The Court's finding that appropriate occasions for juvenile life without parole sentences will be "uncommon" and that the sentencer must consider how a child's status counsels against sentencing *any* child to life without parole underscores that the decision in *Miller* substantively altered sentencing assumptions for juveniles – moving from a pre-*Miller* constitutional tolerance for mandated juvenile life without parole sentences to a post-*Miller* scheme in which even discretionary juvenile life without parole sentences are constitutionally suspect. *See, e.g., State v. Mantich*, --- N.W.2d ---, 287 Neb. 320, 341 (describing *Miller* as substantive "because it sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except in the rarest of cases where that juvenile cannot be distinguished from an adult based on diminished capacity or culpability.")

c. *Miller* Is A "Watershed Rule" Under *Teague*

As discussed above, *Miller* must be applied retroactively pursuant to *Teague* because it is a substantive rule. Even assuming the rule is procedural, *Miller* must be applied retroactively pursuant to *Teague*'s second exception, which applies to "watershed rules of criminal procedure" and to "those new procedures without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311. This occurs when the rule "requires the observance of

'those procedures that . . . are 'implicit in the concept of ordered liberty.''" *Id.* at 307 (internal citations omitted). To be "watershed[,]" a rule must first "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding and, second, "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418 (2007) (internal citations omitted). The Supreme Court has recognized that sentencing is a critical component of the trial process, and thus directly affects the accuracy of criminal trials. *See, e.g., Witherspoon v. Illinois*, 391 U.S. 510, 523 n.22 (1968) (retroactively applying a decision on a jury selection process that related to sentencing because it "necessarily undermined 'the very integrity of the . . . process' that decided the [defendant's] fate.") (internal citation omitted).

Miller satisfies these requirements. First, mandatory life without parole sentences cause an "impermissibly large risk" of *inaccurately* imposing the harshest sentence available for juveniles. *Whorton*, 549 U.S. at 418. The automatic imposition of this sentence with no opportunity for individualized determinations precludes consideration of the unique characteristics of youth – and of each individual youth – which make them "constitutionally different" from adults. *Miller*, 132 S. Ct. at 2464. *See also id.* at 2469 (explaining that imposing mandatory life without parole sentences "poses too great a risk of disproportionate punishment."). By requiring that specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* alters our understanding of what bedrock procedural elements are necessary to the fairness of such a proceeding. *See id.* (requiring sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."). Indeed, some state appellate courts have adopted this analysis. *See, e.g., People v. Williams*, 982 N.E.2d 181, 196,

197 (Ill. App. Ct. 2012) (granting petitioner the right to file a successive post-conviction petition because *Miller* is a "watershed rule," and at his pre-*Miller* trial, petitioner had been "denied a 'basic 'precept of justice'' by not receiving any consideration of his age from the circuit court in sentencing," and finding that "*Miller* not only changed procedures, but also made a substantial change in the law.").[5] Moreover, *Miller's* admonition – and expectation – that juvenile life without parole sentences will be "uncommon" upon consideration of youth and its "hallmark attributes" explicitly undermines the accuracy of life without parole sentences imposed pre-*Miller* – the very sentences at issue in this appeal.

3. Once A Court Declares A Particular Sentence "Cruel And Unusual" When Imposed On A Juvenile, The Continued Imposition Of That Sentence Violates The Eighth Amendment

The boundaries of the Eighth Amendment are dynamic and constantly evolving. "The [Supreme] Court recognized . . . that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958). The Court has thus recognized that "a penalty that was permissible at one time in our Nation's history is not necessarily permissible today." *Furman v. Georgia*, 408 U.S. 238, 329 (1972) (Marshall, J., concurring).

In recent years, Eighth Amendment jurisprudence has evolved with extraordinary speed in the context of juvenile sentencing. Prior to the Court's 2005 decision in *Roper*, juvenile offenders could be executed. Less than a decade later, not only the death penalty, but life without parole sentences for children are constitutionally disfavored. *See Miller*, 132 S. Ct. at 2469

[5] The question of *Miller*'s retroactivity is currently pending before the Illinois Supreme Court. *See People v. Davis*, No. 115595 (Ill., argued Jan. 15, 2014).

("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty [life without parole] will be uncommon."). This evolution in Eighth Amendment jurisprudence has been informed by brain science and adolescent development research that explains why children who commit crimes are less culpable than adults, and how youth have a distinctive capacity for rehabilitation. *See* Section III. A., *supra*. In light of this new knowledge, the Court has held in *Roper*, *Graham*, and *Miller* that sentences that may be permissible for adult offenders are unconstitutional for juvenile offenders. *See, e.g., Miller,* 132 S. Ct. at 2465 ("In [*Graham*], juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime.").

While this understanding of adolescent development was not fully incorporated into Eighth Amendment jurisprudence when Appellant Carp's and Appellant Davis's direct appeal rights were exhausted, this does not change the fact that Appellants and all other juveniles sentenced pre-*Miller*, just like those sentenced or on direct appeal post-*Miller*, are categorically less culpable than adults and therefore are serving constitutionally disproportionate sentences. *See Miller*, 132 S. Ct. at 2475 (finding "the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment"). Forcing individuals to serve constitutionally disproportionate sentences for crimes they committed as children based on nothing other than the serendipity of the date on which they committed their offenses runs counter to the Eighth Amendment's reliance on the evolving standards of decency and serves no societal interest. *See Mackey v. United States*, 401 U.S. 667, 692-93 (1971) (Harlan, J., concurring) ("[T]he writ [of habeas corpus] has historically been available for attacking convictions on [substantive due process] grounds. This, I believe, is because it represents the clearest instance where finality interests should yield. There is little

societal interest in permitting the criminal process to rest at a point where it ought properly never to repose."). It is both common sense and a fundamental tenet of our justice system that

> the individual who violates the law should be punished to the extent that others in society deem appropriate. If, however, society changes its mind, then what was once "just deserts" has now become unjust. And, it is contrary to a system of justice that a rigid adherence to the temporal order of when a statute was adopted and when someone was convicted should trump the application of a new lesser, punishment.

S. David Mitchell, *Blanket Retroactive Amelioration: a Remedy for Disproportionate Punishments*, 40 Fordham Urb.L.J. City Square 14 (2013), *available at* http://urbanlawjournal.com/?p=1224.

Additionally, depriving the majority of juveniles sentenced to life without parole the benefit of *Miller*'s holding because they have exhausted their direct appeals violates the Eighth Amendment's proscription against the arbitrary infliction of punishments. *See Furman*, 408 U.S. at 256 ("The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."). In his concurring opinion in *Furman*, Justice Brennan found:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause – that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments.

Furman, 408 U.S. at 274 (Brennan, J., concurring). Unless *Miller* is applied retroactively, children who lacked sufficient culpability to justify the life without parole sentences they

received will remain condemned to die in prison simply because they exhausted their direct appeals. As the Illinois Appellate Court concluded in finding *Miller* retroactive for cases on collateral review, in addition to mandatory life without parole sentences constituting "cruel and unusual punishment[,]" "[i]t would also be cruel and unusual to apply that principle only to new cases." *Williams*, 982 N.E.2d at 197. *See also Hill v. Snyder*, No. 10-14568, 2013 WL 364198 at *2 (E.D. Mich., Jan. 30, 2013) (proclaiming that "if ever there was a legal rule that should – as a matter of law and morality – be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice."). The constitutionality of a child's sentence cannot be determined by the arbitrary date his sentence became final. Such a conclusion defies logic, and contravenes Eighth Amendment jurisprudence.

Finally, the U.S. Supreme Court has found that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). *See also Furman*, 408 U.S. at 270 (Brennan, J., concurring) ("The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings."). The Eighth Amendment's emphasis on dignity and human worth has special resonance when the offenders being punished are children. As Justice Frankfurter wrote over fifty years ago in *May v. Anderson,* 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." More recently, the Court has found that:

> [juveniles'] own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. . . . From a moral standpoint it would

> be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.

Roper, 543 U.S. at 570.

In order to treat Appellants Carp and Davis, and the other children sentenced to mandatory life without parole sentences seeking collateral review with the dignity that the Eighth Amendment requires, *Miller* must apply retroactively. "The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." *Graham*, 560 U.S. at 79. Requiring Appellants Carp and Davis to serve their constitutionally disproportionate mandatory life without parole sentence fails to respect their intrinsic worth as human beings.[6]

C. Any Life Without Parole Sentence For A Juvenile Who Did Not Kill or Intend To Kill Is Inconsistent With Adolescent Development And Neuroscience Research And Unconstitutional Pursuant To *Miller* And *Graham*

Pursuant to *Miller* and *Graham*, juveniles convicted of felony murder, such as Appellants Carp and Davis, are constitutionally ineligible to receive life without parole sentences. Michigan's felony murder statute requires no finding that the defendant actually killed or intended to kill; instead, it creates a legal fiction in which intent to kill is inferred from the intent to commit the underlying felony. Such intent cannot be inferred when the offender is a juvenile. Thus, pursuant to *Graham*, juveniles who neither kill nor intend to kill cannot be

[6] As the trial court emphasized in its order granting Mr. Davis a resentencing hearing pursuant to *Miller*, "we have locked him behind bars for over 18 years as a juvenile who did not pull the trigger, who told the victim that he had at gunpoint that everything will be alright, and who had the potential to be rehabilitated. We, the People of the State of Michigan have treated this juvenile, now man, inhumanely." Application for Leave to Appeal, *People v. Davis* at vi-vii, Mar. 8, 2013 (quoting Order of the Third District Court, dated December 11, 2012).

sentenced to life without parole, Moreover, pursuant to *Miller*, only the most serious juvenile offenders should receive life without parole.[7] Accordingly, juveniles convicted of felony murder, like Appellants Carp and Davis, can never receive this harshest possible sentence.

1. Intent To Kill Cannot Be Inferred When A Juvenile Is Convicted Of Felony Murder

A felony murder conviction requires simply that an offender participated in a felony and that someone was killed in the course of the felony; the offender need not have actually committed the killing or intended that anyone would die. *See* M.C.L. 750.316. Felony murder is justified by a "transferred intent" theory, where the intent to kill is inferred from an individual's intent to commit the underlying felony since a reasonable person would know that death is a possible result of felonious activities. *See, e.g., People v. Aaron*, 299 N.W.2d 304, 317 (Mich. 1980) ("The most fundamental characteristic of the felony-murder rule [is that] it punishes all homicides, committed in the perpetration or attempted perpetration of proscribed felonies whether intentional, unintentional or accidental, without the necessity of proving the relation between the homicide and the perpetrator's state of mind.").

The felony murder doctrine's theory of transferred intent is inconsistent with adolescent developmental and neurological research recognized by the United States Supreme Court in *Roper*, *Graham*, *J.D.B.*, and *Miller*. *See, e.g., J.D.B.*, 131 S. Ct. at 2404 (noting that the common law has long recognized that the "reasonable person" standard does not apply to children).[8] These cases preclude ascribing the same level of anticipation or foreseeability to a

---

[7] *Miller* noted that "*appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*," 132 S. Ct. at 2469 (emphasis added). Quoting *Roper* and *Graham*, *Miller* further notes that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." *Id.*

[8] Notably, even as applied to adults, the United States Supreme Court "has made clear that

juvenile who takes part in a felony—even a dangerous felony—as the law ascribes to an adult.[9]

As Justice Breyer explains in his concurring opinion in *Miller*:

> At base, the theory of transferring a defendant's intent is premised on the idea that one engaged in a dangerous felony should understand the risk that the victim of the felony could be killed, even by a confederate. Yet the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack the capacity to do effectively.

132 S. Ct. at 2476 (Breyer, J., concurring) (internal citations omitted). Because adolescents' risk assessment and decision-making capacities differ from those of adults in ways that make it unreasonable to infer that a juvenile who decides to participate in a felony would reasonably know or foresee that death may result from that felony, their risk-taking should not be equated with malicious intent, nor should their recklessness be equated with indifference to human life.[10] In particular, the Supreme Court has noted that adolescents have "[d]ifficulty in

---

this artificially constructed kind of intent does not count as intent for the purposes of the Eighth Amendment." *Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring). *See also Enmund v. Florida*, 458 U.S. 782 (1982).

[9] Specifically, the United States Supreme Court has observed that adolescents "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *J.D.B.*, 131 S. Ct. at 2403 (internal quotation omitted). In the criminal sentencing context, the Court has recognized that adolescents' "'lack of maturity and underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions.'" *Graham*, 560 U.S. at 72 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)). In particular, this Court has noted that adolescents have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." *Id.* at 78. The Supreme Court has also recognized that juveniles are more vulnerable or susceptible to negative influences and outside pressures" than adults. *Roper*, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id.*

[10] The U.S. Supreme Court has held that the death penalty can be imposed on an adult convicted of felony murder where the adult was a major participant in the crime and was recklessly indifferent to human life. *Tison v. Arizona*, 481 U.S. 137, 152 (1987). In *Roper* and *Graham*, however, the Court recognized that youth generally are more reckless than adults, which can result in "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569; *Graham*, 560 U.S. at 72. An adolescent's recklessness is not a manifestation of his indifference to human life so much as a reflection of his immaturity and impulsiveness.

weighing long-term consequences" and "a corresponding impulsiveness." *Graham*, 560 U.S. at 78. The Court also has recognized that juveniles are more vulnerable or susceptible to negative influences and outside pressures" than adults. *Roper*, 543 U.S. at 569. They "have less control, or less experience with control, over their own environment." *Id.*

2. Any Life Without Parole Sentence For A Juvenile Convicted Of Felony Murder Is Unconstitutional Pursuant To *Miller* And *Graham*

In *Graham*, the United States Supreme Court found that children "who did not kill or intend to kill" have a "twice diminished" moral culpability due to both their age and the nature of the crime. 560 U.S. at 69. The Court further "recognized that defendants *who do not kill, intend to kill, or foresee that life will be taken* are categorically less deserving of the most serious forms of punishment than are murderers." *Id.* (emphasis added). Because in Michigan a conviction of felony murder includes no finding of fact that a defendant killed, intended to kill, or foresaw that a life would be taken, *see* M.C.L. 750.316,[11] sentencing a juvenile convicted of felony murder to life without parole is unconstitutional under *Graham*.[12]

Miller, too, dictates that life without parole is an inappropriate sentence for Appellants

---

[11] As described in the preceding section, the theory of transferred intent cannot apply to a juvenile convicted of felony murder.

[12] In his concurrence in *Miller*, Justice Breyer explained:

> Given *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim. Quite simply, if the juvenile either kills or intends to kills the victim, he lacks "twice diminished" responsibility. But where the juvenile neither kills nor intends to kill, both features emphasized in *Graham* as extenuating apply. The dissent itself here would permit life without parole for "juveniles who commit the worst types of murder," but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.

Miller, 132 S. Ct. at 2466-67 (internal citations omitted).

convicted under a felony murder theory. As the Court cautioned, "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, *we think appropriate occasions for sentencing juveniles to this harshest possible penalty* [life without parole] *will be uncommon*," 132 S. Ct. at 2469 (emphasis added). Therefore, to the extent juvenile life without parole sentences are ever appropriate, *Miller* necessitates they be imposed only in the most extreme circumstances. Under *Miller*, a juvenile convicted of felony murder who did not kill or intend to kill cannot be categorized as one of the most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See id.* at 2476 (Breyer, J., concurring) ("The dissent itself here would permit life without parole for 'juveniles who commit the worst types of murder,' but that phrase does not readily fit the culpability of one who did not himself kill or intend to kill.").[13]

Since, specifically, an accomplice is less culpable than a shooter and, more generally, a person who did not kill or intend to kill is less culpable than an intentional killer, the Court's reasoning implies that a juvenile convicted of felony murder would never be categorized as one of the "uncommon" most serious, most culpable juvenile offenders for whom a life without parole sentence would be proportionate or appropriate. *See Miller*, 132 S. Ct. at 2466-67 (Breyer, J., concurring). Accordingly, a sentencing court confronting a child found culpable under a felony murder theory of liability should consider the "'twice diminished moral

[13] Although acknowledging that the Constitution sometimes allows the imposition of the harshest available sentence (for adults, the death penalty) when adult felony murder defendants are "actively involved" in the crime and display "a reckless disregard for human life," Justice Breyer draws a different line for juveniles. Justice Breyer urges, that "even juveniles who meet the *Tison* standard of 'reckless disregard' may not be eligible for life without parole." *Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring). To face a life without parole sentence, a juvenile must have either killed or intended to kill; recklessness is not sufficient. This is precisely what the Court held in *Graham*.

culpability'" of a "'juvenile offender who did not kill or intend to kill.'" *Miller*, 132 S. Ct. at 2468 (quoting *Graham*, 560 U.S. at 69)).[14] Since MCL 750.316 does not allow for this type of consideration, the statute is unconstitutional.

D. All Juveniles Convicted Of Murder In Michigan Are Entitled To Individualized Sentences That Presumptively Provide A Meaningful Opportunity For Release

At the time of Appellants' sentencings, the sentencers were bound by Michigan law governing murder; the sentencing scheme did not permit consideration of the attributes of youth which *Miller* now requires to be considered. M.C.L. 750.316.[15] Appellants are entitled to individualized resentencings in which the sentencer takes into account how their status as children counsels against imposing life without parole sentences.

1. Appropriate Occasions For Imposing Life Without Parole Sentences On Will Be Rare And Sentencers Must Consider How An Offender's Young Age Counsels In Favor Of Providing Release

[14] In *Miller*'s companion case, *Jackson v. Hobbs*, the Court was confronted with Jackson's argument that the Eighth Amendment requires a categorical ban on life without parole for juveniles convicted of felony murder. Because a ban on mandatory life without parole was "sufficient to decide these cases," the Court did not consider Jackson's and Miller's alternative arguments, including Jackson's argument on felony murder. *Miller*, 132 S. Ct. at 2468. As is discussed above, although not reaching the issue, the reasoning underpinning the Court's opinion in *Miller*, together with Justice Breyer's concurrence, establish that life without parole sentence for a juvenile convicted of felony murder is *always* unconstitutional. A juvenile who did not kill or intend to kill by definition cannot be one of the most culpable juvenile offenders, which under *Miller*, are the only offenders who may be deserving of this most severe penalty.

[15] As the trial court judge noted at Appellant Davis' resentencing hearing, "[m]andatorily, I must sentence you to natural life in prison" despite also professing that "I still feel, and I continue to feel, that he could be rehabilitated." Application for Leave to Appeal, *People v. Davis* at 4, Mar. 8, 2013 (quoting Final Sentencing Hearing Dec. 22, 1994). He further urged Appellant Davis that "[t]he only thing I can say to you is that it's my belief that they are going to change this. You're going to find out how unjust it is to do this. So, don't give up hope." *Id.* This was after the trial court judge refused to sentence Mr. Davis to life without parole because she found that punishment to be cruel and unusual. *Id.* at 3 (quoting Sentencing Hearing June 20, 1994 (in which the sentencing court said, "I am not in this instant [sic] going to impose mandatory life in prison, as I think it is cruel and unusual punishment.")).

While the United States Supreme Court has left open the possibility that a trial court could impose a life without parole sentence on a juvenile, the Court has made clear that such sentences should be uncommon. *Miller*, 132 S. Ct. at 2469 (emphasis added). Quoting *Roper* and *Graham*, *Miller* further notes that the "juvenile offender whose crime reflects irreparable corruption" will be "rare." 132 S. Ct. at 2469.[16]

Miller sets forth specific factors that the sentencer, at a minimum, should consider before imposing a life without parole sentence on a juvenile: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;" (3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Id.* at 2468.

Importantly, *Miller* does not merely require that these factors be considered, but also requires the sentencer "to take into account how [the] differences [between children and adults] *counsel against irrevocably sentencing them to a lifetime in prison.*" *Id.* at 2469 (emphasis added). Therefore, prior to imposing a juvenile life without parole sentence, a sentencer must specifically find how the child's characteristics overcome this presumption against sentencing the child to life without parole. Such a determination, however, cannot rely solely on the nature of the offense; as the U.S. Supreme Court has found, in the context of the death penalty, "[a]n

[16] The Supreme Court has repeatedly found that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *See Roper*, 543 U.S. at 573; *see also Graham*, 560 U.S. at 73; *Miller*, 132 S. Ct. at 2469.

unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." *Roper*, 543 U.S. at 573. The same risk exists in the context of juvenile life without parole sentences, which, as applied to children, the Court has equated with the death penalty. *Miller*, 132 S. Ct. at 2459.

Further complicating the task of determining whether a juvenile offender is the "rare" child for whom a life without parole sentence may be appropriate is the U.S. Supreme Court's repeated finding that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *See Roper*, 543 U.S. at 573; *see also Graham*, 560 U.S. at 73; *Miller*, 132 S. Ct. at 2469. Accordingly, this Court should impose a strong presumption against imposing life without parole sentences on juveniles that can only be overcome in the most extreme circumstances, and not based solely on the nature of the offense.

2. Absent A Finding That Appellants Are Among The Rare Juveniles For Whom Life Without Parole Is Appropriate, They Must Be Provided A Meaningful Opportunity For Release

Absent a finding that Appellants are among the rare juveniles for whom life without parole is appropriate, the trial courts must impose sentences that provide them a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Graham,* 560 U.S. at 75. As *Graham* makes clear, the Eighth Amendment "forbid[s] States from making the judgment at the outset that [juvenile] offenders never will be fit to reenter society." *Id.* Juveniles who receive non-life without parole sentences "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential." *Id.* at 2032.

For an opportunity for release to be "meaningful" under *Graham*, review must begin long before a juvenile reaches old age. The appellate court in *Carp* conceded that a life with parole sentence would likely result in dying in prison. *People v. Carp*, 828 N.W.2d 685, 721-723 (2012) (acknowledging "that the release of a prisoner on parole is discretionary by the Parole Board, and, based on that discretion, a prisoner does not possess a protected liberty interest in being paroled before the expiration of his or her sentence" and detailing the history of parole in Michigan, and how it has become increasingly difficult to obtain). The Supreme Court has noted that"'[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)). Because most juveniles are likely to outgrow their antisocial and criminal behavior as they mature into adults, review of a youth's maturation and rehabilitation should begin relatively early in serving a sentence, and his or her progress should be assessed regularly. *See, e.g.*, *Research on Pathways to Desistance; December 2012 Update*, Models for Change, *available at:* http://www.modelsforchange.net/publications/357 (finding that, of the more than 1,300 serious offenders studied for a period of seven years, only approximately 10% report continued high levels of antisocial acts. The study also found that "it is hard to determine who will continue or escalate their antisocial acts and who will desist[,]" as "the original offense . . . has little relation to the path the youth follows over the next seven years."). The sentencing options crafted by the appellate court in Appellant Eliason's case fails to take into account his characteristics at the

time of the offense, and instead rely on the parole board to potentially assess his "mental and social attitude" only years later, when he could become parole eligible. M.C.L. 791.233(1)(a). As the dissent in *Eliason* articulates, "*Miller* does not contemplate that a parole board may substitute for a sentencing judge." *People v. Eliason*, 300 Mich. App. 293, 324-25, 833 N.W.2d 357, 377 (2013) (Gleicher, P.J., dissenting). Parole consideration is by definition a post-sentence deliberation; *Miller* and *Graham* establish new rules that are applicable at the time of sentence.

A "meaningful opportunity for release" also requires that the parole board focus on the characteristics of the youth, including his or her lack of maturity at the time of the offense, and not merely the circumstances of the offense. *Roper* cautioned against the "unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course." 543 U.S. at 573. *See also Graham,* 560 U.S. at 78. Similarly, in parole review, the parole board must not allow the underlying facts of the crime to overshadow the juvenile's immaturity at the time of the offense and progress and growth achieved while incarcerated. Additionally, for the opportunity for release to be meaningful, the juvenile's young age at the time of the offense and incarceration cannot be a factor that makes release *less* likely. *Cf. Roper*, 543 U.S. at 573 (noting that "[i]n some cases a defendant's youth may even be counted against him"); Ga. Comp. R. & Regs. r. 475-3-.05(8)(e) (automatically assigning a higher risk score to inmates admitted to prison at age 20 or younger for the purposes of assessing parole eligibility in Georgia).[17]

---

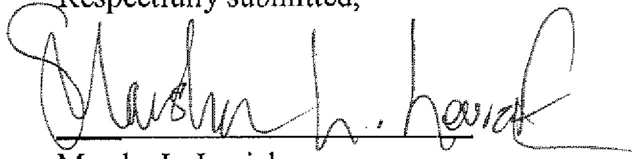
[17] Additionally, parole boards should be mindful that any risk assessment tools that favorably assess inmates with a stable employment histories or stable marriages may not be applicable to inmates who were incarcerated as children and therefore had little or no opportunity to establish an employment history or stable marital relationships prior to their incarceration. *See, e.g.,* Ga. Comp. R. & Regs. r. 475-3-.05(8)(g) (Georgia regulations giving lower risk scores to inmates who were employed at the time of their arrest); Mich. Comp. Laws § 791.235 (3)(a) (noting that the parole board in Michigan can consider an inmate's marital history).

IV. CONCLUSION

As Justice Frankfurter wrote over fifty years ago in *May v. Anderson* 345 U.S. 528, 536 (1953), "[c]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children." Adult sentencing practices that currently preclude consideration of the distinctive characteristics of individual juvenile defendants are unconstitutionally disproportionate punishments. Requiring individualized determinations in these cases does not require excusing juvenile offending. Juveniles who commit serious offenses should not escape punishment. But the U.S. Supreme Court's recent Eighth Amendment jurisprudence striking particular sentences for juveniles does require that additional considerations and precautions be taken to ensure that the sentence reflects the unique developmental characteristics of adolescents. As the Supreme Court has acknowledged, a child's age is far "more than a chronological fact." *See J.D.B. v. North Carolina* 564 U.S. 1, 8 (2011).

The Supreme Court's decision in *Miller* applies retroactively to cases on collateral review like those of Appellants Carp and Davis. While this conclusion flows naturally from the Supreme Court's application of *Miller* to its companion case, *Jackson v. Hobbs,* the Supreme Court's jurisprudence makes clear that no other reading of the *Miller* decision would be consistent with the spirit or meaning of the Eighth Amendment. Accordingly, this Court should vacate Appellants' sentences and remand their cases for re-sentencing in accordance with *Miller*.

Respectfully submitted,



Marsha L. Levick
Juvenile Law Center
1315 Walnut Street, 4th Floor
Philadelphia, PA 19107
P: (215) 625-0551
F: (215) 625-2801

Counsel for *Amici Curiae*

Bruce W. Neckers, Esq. (P18198)
Rhoades McKee PC
160 Ottawa NW, Suite 600
Grand Rapids, MI 49503
P: (616) 233-5217
F: (616) 233-5269

Local Counsel

APPENDIX

Identity of *Amici* and Statements of Interest

Organizations

Founded in 1975 to advance the rights and well-being of children in jeopardy, **Juvenile Law Center** (JLC) is the oldest multi-issue public interest law firm for children in the United States. JLC pays particular attention to the needs of children who come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential placement facilities or adult prisons, and children in placement with specialized service needs. JLC works to ensure that children are treated fairly by the systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

The **Campaign for the Fair Sentencing of Youth** (CFSY) is a national coalition and clearinghouse that coordinates, develops and supports efforts to implement just alternatives to the extreme sentencing of America's youth with a focus on abolishing life without parole sentences for all youth. Our vision is to help create a society that respects the dignity and human rights of all children through a justice system that operates with consideration of the child's age, provides youth with opportunities to return to community, and bars the imposition of life without parole for people under age eighteen. We are advocates, lawyers, religious groups, mental health experts, victims, law enforcement, doctors, teachers, families, and people directly impacted by this sentence, who believe that young people deserve the opportunity to give evidence of their remorse and rehabilitation. Founded in February 2009, the CFSY uses a multi-pronged approach, which includes coalition-building, public education, strategic advocacy and collaboration with impact litigators--on both state and national levels-to accomplish our goal.

The **Center for Children's Law and Policy (CCLP)** is a public interest law and policy organization focused on reform of juvenile justice and other systems that affect troubled and at-risk children, and protection of the rights of children in such systems. The Center's work covers a range of activities including research, writing, public education, media advocacy, training, technical assistance, administrative and legislative advocacy, and litigation. CCLP works locally in DC, Maryland and Virginia and also across the country to reduce racial and ethnic disparities in juvenile justice systems, reduce the use of locked detention for youth and advocate safe and humane conditions of confinement for children. CCLP helps counties and states develop collaboratives that engage in data driven strategies to identify and reduce racial and ethnic disparities in their juvenile justice systems and reduce reliance on unnecessary incarceration. CCLP staff also work with jurisdictions to identify and remediate conditions in locked facilities that are dangerous or fail to rehabilitate youth.

The **Defender Association of Philadelphia** is an independent, non-profit corporation created in 1934 by a group of Philadelphia lawyers dedicated to the ideal of high quality legal services for indigent criminal defendants. Today some two hundred and fifteen full time assistant

defendants represents clients in adult and juvenile, state and federal, trial and appellate courts, and at civil and criminal mental health hearings as well as at state and county violation of probation/parole hearings. Association attorneys also serve as the Child Advocate in neglect and dependency court. More particularly, Association attorneys represent juveniles charged with homicide. Life imprisonment without the possibility of parole is the only sentence for juveniles found guilty in adult court of either an intentional killing or a felony murder. The Defender Association attorneys have had numerous juveniles given sentences of life imprisonment without parole. The constitutionality of such sentences has been challenged at the trial level and at the appellate level by Defender Association lawyers.

Fight for Lifers, West is a Lifers Support Group in Western Pennsylvanian devoted to Prisoners in Pennsylvania who are sentenced to Life Imprisonment Without Parole. In the years since Roper, FFLW has identified 481 Juvenile Lifers in the PADOC, revealing that Pennsylvania leads the world in this category. We have sent 36 Newsletters, one every two months to these Juvenile Lifers, helping to make these prisoners aware of each other and giving important information to them. In this way they have shared information with each other, and made an impact of the outside world. FFLW has been seriously involved in the PA Senate Judiciary Committee Public Hearing on Juvenile Lifers, September 22, 2008, and in the United States House Subcommittee on Crime and Terrorism and Homeland Security hearing on H.R. 2289--Juvenile Justice Accountability and Improvement Act of 2009--on June 9, 2009. FFLW was included in an Amicus Brief filed by the Juvenile Law Center in *Graham v. Florida* in 2009.

Juvenile Justice Initiative (JJI) of Illinois is a non-profit, non-partisan, inclusive statewide coalition of state and local organizations, advocacy groups, legal educators, practitioners, community service providers and child advocates supported by private donations from foundations, individuals and legal firm. JJI as a coalition establishes or joins broad-based collaborations developed around specific initiatives to act together to achieve concrete improvements and lasting changes for youth in the justice system, consistent with the JJI mission statement. Our mission is to transform the juvenile justice system in Illinois by reducing reliance on confinement, enhancing fairness for all youth, and developing a comprehensive continuum of community-based resources throughout the state. Our collaborations work in concert with other organizations, advocacy groups, concerned individuals and state and local government entities throughout Illinois to ensure that fairness and competency development are public and private priorities for youth in the justice system.

Juvenile Justice Project of Louisiana (JJPL) is the only statewide, non-profit advocacy organization focused on reform of the juvenile justice system in Louisiana. Founded in 1997 to challenge the way the state handles court involved youth, JJPL pays particular attention to the high rate of juvenile incarceration in Louisiana and the conditions under which children are incarcerated. Through direct advocacy, research and cooperation with state run agencies, JJPL works to both improve conditions of confinement and identify sensible alternatives to incarceration. JJPL also works to ensure that children's rights are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights. JJPL continues to work to build the capacity of Louisiana's juvenile public defenders by providing support, consultation and training, as well as pushing for system-wide reform and increased resources for

juvenile public defenders.

The **Michigan League for Public Policy** supports the Brief of the Juvenile Law Center, et al. as *AMICI CURIAE* in Support of Appellants Carp, Davis and Eliason. The League, which has been tracking the well-being of children through the Kids Count in Michigan project for the past 22 years, has been advocating for laws that protect and support children and youth in Michigan for more than 100 years. We believe that *Miller v. Alabama* is retroactive, that life without parole is not a constitutional sentence for juveniles convicted of felony murder, and that every child convicted of murder in Michigan must receive an individualized sentence that takes into account his or her age and circumstances, and offers a meaningful opportunity for release.

Amicus Curiae **National Association of Criminal Defense Lawyers (NACDL)** is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of approximately 10,000 and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it representation in its House of Delegates. NACDL is dedicated to advancing the proper, efficient, and just administration of justice including issues involving juvenile justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL has a particular interest in these cases because the proper administration of justice requires that age and other circumstances of youth be taken into account in order to ensure compliance with constitutional requirements and to promote fair, rational and humane practices that respect the dignity of the individual.

The **National Association of Counsel for Children (NACC)** is a non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. Founded in 1977, the NACC is a multidisciplinary organization with approximately 2200 members representing all 50 states, DC, and several foreign countries. The NACC works to improve the delivery of legal service to children, families, and agencies; advance the rights and interests of children; and develop the practice of law for children and families as a sophisticated legal specialty. NACC programs include training and technical assistance, the national children's law resources center, the attorney specialty certification program, the model children's law office project, policy advocacy, and the amicus curiae program. Through the amicus curiae program, NACC has filed numerous briefs involving the legal interest of children in state and federal appellate courts and the Supreme Court of the United States. Founded in 1977, the National Association of Counsel for Children (NACC) is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC

programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the amicus curiae program. Through the amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children and their families in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as amicus curiae. Amicus cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument to be presented must be supported by existing law or good faith extension the law; there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 3000 members representing all 50 states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The **National Center for Youth Law** (NCYL) is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. NCYL supports the advocacy of others around the country through its legal journal, Youth Law News, and by providing trainings and technical assistance. NCYL has participated in litigation that has improved the quality of foster care in numerous states, expanded access to children's health and mental health care, and reduced reliance on the juvenile justice system to address the needs of youth in trouble with the law. As part of the organization's juvenile justice agenda, NCYL works to ensure that youth in trouble with the law are treated as adolescents and not adults, in a manner that is consistent with their developmental stage and capacity to change.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

The **National Juvenile Justice Network (NJJN)** leads and supports a movement of state and local juvenile justice coalitions and organizations to secure local, state and federal laws, policies

and practices that are fair, equitable and developmentally appropriate for all children, youth and families involved in, or at risk of becoming involved in, the justice system. NJJN currently comprises forty-three members in thirty-three states, all of which seek to establish effective and appropriate juvenile justice systems. NJJN recognizes that youth are fundamentally different from adults and should be treated in a developmentally appropriate manner that holds them accountable in ways that give them the tools to make better choices in the future and become productive citizens. Youth should not be transferred into the adult criminal justice system where they are subject to extreme and harsh sentences such as life without the possibility of parole, and placed in adult prisons where they are exceptionally vulnerable to rape and sexual assault and have much higher rates of suicide. NJJN supports a growing body of research that indicates the most effective means for addressing youth crime are age-appropriate, rehabilitative, community-based programs that take a holistic approach, engage youth's family members and other key supports, and provide opportunities for positive youth development.

The **Pacific Juvenile Defender Center** is a regional affiliate of the National Juvenile Defender Center. Members of the Center include juvenile trial lawyers, appellate counsel, law school clinical staff, attorneys and advocates from nonprofit law centers working to protect the rights of children in juvenile delinquency proceedings in California and Hawaii. The Center engages in appellate advocacy, public policy and legislative discussions with respect to the treatment of children in the juvenile and criminal justice systems. Center members have extensive experience with cases involving serious juvenile crime, the impact of adolescent development on criminality, and the differences between the juvenile and adult criminal justice systems. These cases, involving the imposition of Life Without the Possibility of Parole on juvenile offenders, present questions that are at the core of the Pacific Juvenile Defender Center's work.

The mission of the **San Francisco Office of the Public Defender's** is to provide vigorous, effective, competent and ethical legal representation to persons who are accused of crime and cannot afford to hire an attorney. We provide representation to 25,000 individuals per year charged with offenses in criminal and juvenile court.

<u>Individuals</u>

Laura Cohen is a Clinical Professor of Law at the Rutgers School of Law in Newark, New Jersey, where she directs the Criminal and Youth Justice Clinic. She is the former director of training for the New York City Legal Aid Society's Juvenile Rights Division, where she oversaw both the attorney training program and public policy initiatives relating to juvenile justice and child welfare. She also has served as a senior policy analyst for the Violence Institute of New Jersey; deputy court monitor in Morales Feliciano v. Hernandez Colon, a prisoners' rights class action in the U.S. District Court in San Juan, Puerto Rico; adjunct professor at New York Law School; and staff attorney for the Legal Aid Society. Professor Cohen co-directs the Northeast Regional Juvenile Defender Center, an affiliate of the National Juvenile Defender Center, which is dedicated to improving the quality of representation accorded children in juvenile court. Her scholarly interests include juvenile justice, child welfare, and the legal representation of children and adolescents. Professor Cohen teaches doctrinal and clinical courses relating to juvenile justice law and policy, is a team leader of the MacArthur Foundation funded New Jersey Juvenile Indigent Defense Action Network, and has published numerous articles on juvenile justice and child welfare.

Stephen K. Harper is a clinical professor at Florida International University College of Law. Prior to that he taught juvenile law as an adjunct professor at the University of Miami School of law for 13 years. From 1989 until 1995 he was the Chief Assistant Public Defender in charge of the Juvenile Division in the Miami-Dade Public Defender's Office. In 1998 he was awarded the American Bar Association's Livingston Hall Award for "positively and significantly contributing to the rights and interests" of children. Harper took a leave of absence from his job to coordinate the Juvenile Death Penalty Initiative which ended when the Supreme Court of the United States ruled in *Roper v Simmons*, 543 U.S. 551 (2005). In 2005 he, along with Seth Waxman, received the Southern Center for Human Rights Frederick Douglass Award for his work in ending the juvenile death penalty. He has consulted in many juvenile cases in Florida, Guantanamo and the United States Supreme Court (including *Graham v Florida*, 130 S. Ct. 2011 (2010), and *Miller v Alabama*, 567 U.S.___ 2010).

Sandra Simkins created and co-directs the Rutgers Children's Justice Clinic, the first clinic at the law school to focus on children. She is a national trainer on the issue of girls in the juvenile justice system and is involved in conditions of confinement reform. Prior to joining the Rutgers faculty in 2006, she spent 15 years working in criminal and juvenile defense. She served as assistant chief of the Juvenile Unit at the Defender Association of Philadelphia, supervising and training a staff of 40, including 23 lawyers, to represent children in the juvenile justice system. Professor Simkins also was involved in wide range of national and statewide policy reform for children. In 2009, she was selected as "Lawyering Professor of the Year" and in 2007 she received the "New Professor of the Year" award, both at the Rutgers School of Law–Camden. In 2008, she was selected by the MacArthur Foundation to participate in the Models for Change Juvenile Indigent Defense Action Network. Since creating the Children's Justice Clinic, Professor Simkins has been appointed to several New Jersey committees, including the Supreme Court Committee on Women in the Courts, the Camden Safer Cities Initiative, and Camden County's Steering Committee for the Annie E. Casey Foundation's Juvenile Detention Alternative Initiative. She also co-directs the Northeast Region Juvenile Defender Center, a subsidiary of the National Juvenile Defender Center, where she provides consultation and training to child advocates in Delaware, New Jersey, New York, and Pennsylvania. She has championed the creation of effective statewide coalitions and led fundraising initiatives for program development. Her various fundraising efforts have created a specialized mental health and special education attorney, and a statewide training program for juvenile defenders in the state of Pennsylvania. She was selected by Harvard Business School's Social Enterprise Philadelphia Club in 2005 to participate in advanced non-profit management training. In 2004, she was chosen by the MacArthur Foundation to partner with the Foundation's Juvenile Justice Aftercare Initiative in Pennsylvania, and was being recognized in The Philadelphia Lawyer for providing strong advocacy for children at each stage of juvenile court involvement. In 2002, she was the recipient of the American Bar Association's Award for Outstanding Representation of Children. Professor Simkins has taught the Criminal Defense Clinic at the University of Pennsylvania Law School and Juvenile Law at the Temple University Beasley School of Law.